United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

689

UNITED STATES COURT OF APPEALS
For the District of Columbia Circuit

UNITED STATES OF AMERICA, Appellee.	:	Criminal No. 23,092
v.	:	
JAMES L. SUGGS, Appellant.	:	
UNITED STATES OF AMERICA, Appellee,	:	Criminal No. 23,201
v.	:	
AUGUSTUS R. HARRIS, JR., Appellant.	:	

BRIEF OF APPELLANTS

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United States Court of Appeals
for the District of Columbia Circuit

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Nathan J. Paulson
CLERK

TABLE OF CONTENTS

TABLE OF CASES

Citations (Asterisks denote Authorities principally relied upon)

REFERENCES TO RULINGS

Tr. 7	Motion for continuance (Suggs), denied.
Tr. 12	Motion for pre-trial hearing on delay (Harris), denied.
Tr. 14	Motion for dismissal (Speedy trial) (Suggs), denied.
Tr. 79	Motion for acquittal (Harris), denied.
Tr. 410	Motion to suppress Identification of Suggs by Benson due to "suggestion", denied.
Tr. 914	Motion for acquittal (Suggs), denied.
Tr. 909	Motion for acquittal (Harris), denied.

CONSTITUTION, STATUTES AND RULES INVOLVED.

The Sixth Amendment to the United States Constitution reads as follows:

"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial . . . "

Title 14, D. C. Code, Section 102, provides:

"When the court is satisfied that the party producing a witness has been taken by surprise by the testimony of the witness, it may allow the party to prove, for the purpose only of affecting the credibility of the witness, that the witness has made to the party or to his attorney statements substantially variant from his sworn testimony about material facts in the cause. . ."

Federal Rules of Criminal Procedure, Number 29-A states:

"(a) Motion Before Submission to Jury. Motions for directed verdict are abolished and motions for judgment of acquittal shall be used in their place. The court on motion of a defendant or of its own motion shall order the entry of judgment of acquittal of one or more offenses charged in the indictment or information after the evidence on either side is closed if the evidence is insufficient to sustain a conviction of such offense or offenses. If a defendant's motion for judgment of acquittal at the close of the evidence offered by the government is not granted, the defendant may offer evidence without having reserved the right."

Federal Rules of Criminal Procedure , Number 48 (b) provides:

"(b) By Court. If there is unnecessary delay in presenting the charge to a grand jury or in filing an information against a defendant who has been held to answer to the district court, or if there is unnecessary delay in bringing a defendant to trial, the court may dismiss the indictment, information or complaint."

JURISDICTIONAL STATEMENT

Appellants, Augustus R. Harris, Jr., and Jimmy L. Suggs, defendants below in Criminal Case No. 615-67, were convicted by a jury of violating 18 U.S.C. 2113 (a) (taking money belonging to and in custody and control of a savings and loan association. Upon conviction entered by the District Court on February 25, 1968, an appeal was allowed without prepayment of costs. This court has jurisdiction pursuant to 28 U.S.C. §1291.

Questions presented by the appeal of Appellant Suggs:

1. Is a procedure whereby a crucial identification witness is shown hundreds of photographs in "mug books" along with two unmounted photographs, one of a neighbor of the witness and the other of the defendant, so fundamentally suggestive and unfair as to deny Appellant his right to fair trial?

2. Is a procedure whereby a crucial identification witness is told that he was called to the police station to identify someone, and then does identify as one of the robbers a man who is paraded past him in the custody of a person assumed (correctly) by the witness to be a detective, so fundamentally suggestive and unfair as to deny Appellant his right to a fair trial?

3. Is the combination of both of the above procedures with respect to the same witness, coupled with the use of the second with respect to the only two other identification witnesses, so fundamentally unfair and suggestive as to deny Appellant his right to a fair trial?

4. Can the prosecution be allowed to prove its case with respect to the identifications given by two out of three witnesses offered for that purpose, by declaring surprise and proceeding to delve at length into the witnesses' prior statements when the witnesses decline on the occasion of trial to identify the Appellant?

5. Where the trial for offenses committed in November, 1966 was had starting in February, 1969; and in the light of the prejudice caused by the imperfect memory of the witnesses, and the consequent excessive reliance by the government on previous statements of the witnesses and in the light of counsel's representations that two key defense witnesses have become hostile in the interim, was not the trial court in error for failing to grant the Appellant's motion to dismiss this case for a lack of speedy trial.

6. Where the government's case was so weak and flawed by contradictions among the government's witnesses, was it error for the court to delivery the "Allen charge" when

the jury had deliberated for twelve hours, and a weekend had intervened making about three days that the jurors had to settle on a verdict?

Questions presented by the appeal of Appellant Harris:

1. Was it error for the court to allow an FBI Agent to testify as to the contents of a conversation he had with Appellant, when the conversation was initiated by the Agent who (without admonishing Appellant as to his rights) falsely stated to Appellant that he was investigating the theft of an automobile, when in reality the Agent suspected Appellant of the robbery which was the subject of this trial, and failed to warn Appellant of that fact; with the result that Appellant was lead to make statements which he may have thought to be exculpatory, but which were almost certainly used by the jury as demonstrating complicity in a previously contrived scheme to cover" Appellant?

2. Where the evidence in the government's case proved only that Appellant was the usual operator of the get-away car, and that he had been seen leaving his home in that car on the morning of the robbery, was it error for the trial court to deny Appellant's motion for acquittal?

3. When the trial for offenses committed in November, 1966, commenced in February, 1969, was not the trial court in error in refusing to grant Appellant's motion to dismiss for lack of a speedy trial, especially in the light of the fact that Appellant had made the same motion nineteen months earlier?

4. Where the government's case was so weak and speculating, was it error for the court to deliver the "Allen charge" when the jury had deliberated for twelve hours, and a weekend had intervened, making about three days that the jurors had to settle on a verdict?

This case has not been previously before this Court.

STATEMENT OF THE CASE

In Summary

Appellants were convicted, following a trial that lasted from February 10, 1969 to February 20, 1969, of the robbery on November 1, 1966, of funds belonging to the Internal Revenue Service Credit Union. The government's evidence against Appellant Harris tended to show that he was the owner of or usual operator of Mutual Cab No. 57; that he was seen leaving his abode in this cab, followed by two other men in a Cadillac early on the morning of the alleged offense; that three men were seen fleeing the scene of the robbery, bearing the

satchel of money that had been stolen; that these three men departed the scene in Mutual Cab No. 57; that shortly after the robbery occurred, Appellant Harris reported to the police that his cab had been stolen and that he had last seen the car that morning shortly after midnight.

As to Appellant Harris, no eye-witness identification was offered by the government, Harris did not take the stand, and he presented only one witness for the purpose of proving that his car had in fact been missing upon his first arising and going out that morning. On this evidence, the jury, evidently believing that Harris and his witness had lied concerning theft of the car, concluded that the unexplained presence of his car at the site of the crime was sufficient evidence to justify conviction.

The evidence against Suggs consists of three eye-witness identifications and a partial fingerprint (identified as his) found on the door-handle button of the get-away car.

Suggs presented evidence tending to establish an alibi. His witnesses (including himself) testified that Suggs was having breakfast with friends at the Pantry House of the New Hampshire Motor Inn at the time of the robbery. He also presented several witnesses who testified that people in the neighborhood where both he and Harris lived frequently hired Harris' cab for errands, and that Suggs had frequently done so himself. This explained his fingerprint on the doorhandle of the car.

Statement of the Case for Appellant Suggs

Prior to the commencement of the trial, counsel for Appellant Suggs moved for a continuance, urging that he had not sufficient time to prepare the

case because of the lateness of his appointment. He first received notice of the appointment on January 27, 1969. Trial commenced on February 10. Between receiving notice of the appointment and the trial date, counsel had had previously scheduled court appearances on January 28, February 4, February 5, and February 7. The crime with which Suggs was charged occurred November 1, 1966. Upon denial of the motion for continuance (Tr. 7) counsel moved (Tr. 12) for dismissal of the case for want of a speedy trial, based on the following facts: Suggs was indicted in January of 1967, and his pro se motion for dismissal for lack of speedy trial was heard and denied in March of that year. During the two and one-half years elapsing between the offense and the trial, at least one crucial alibi witness and one witness who could have impeached one of the government's identification witnesses had turned hostile, and indicated their unwillingness to testify on behalf of Suggs except under judicial compulsion. Counsel stated also (Tr. 14) that the elapsed time would detract from the precision of the witness' memories - a prophetic statement indeed!

Appellant was convicted of robbery of funds belonging to the Internal Revenue Credit Union. The theft occurred on November 1, 1966, when three persons struck an employee of the Union, Mrs. Hattie Sallade, from behind and ran with the satchel she had been carrying containing cash in excess of $34,000.00 belonging to the credit union. (Tr. 84 - 86). Mrs. Sallade could not identify any of her assailants, as she did not see them face to face (Tr. 86), she could only state they were Negroes, and offer a very sketchy description of their general build and attire (Tr. 86).

After Mrs. Sallade testified, the government called one Julius Benson. Anticipating that this witness was to be used for the purpose of identification, counsel for Appellant Suggs requested that a 'Stovall' hearing be held to inquire into pretrial identification procedures. (Tr. 119). Accordingly, the jury was excluded and the following testimony was taken regarding the previous occasions on which this witness had identified Suggs as one of Mrs. Sallade's assailants. Mr. Benson had driven Mrs. Sallade to the Credit Union, and was near the scene of the robbery when it occurred (Tr. 114). Amid a bewildering array of self-contradictions as to details such as dates and locations of the various interviews to which the witness was subject, the following facts emerge with crystal clarity: The day of the robbery he was interviewed by the police, after which he made and signed a statement in which he failed to make any positive identification of any suspect (Tr. 115: "Q. I am asking you at that time could you identify the defendant? A: Not at that time.") Significantly, the witness at this time even failed to include in his description to the police any mention of a scar on Suggs' face which was quite prominent at the time.

Prior to the signing of this statement, the witness was given pictures to look at in the hope that he would be able to identify a suspect. Benson's testimony as to this process is crucial enough to warrant quotation at length:

Q. How many photographs did they show you at that time?

A. A lot of books. (Tr. 118)

THE COURT: How many pictures?

A. Well, there was about five, maybe six or seven books.

THE COURT: How many would you guess were in them? A great number or -

A. Approximately twenty pages back and front.

THE COURT: And how many pictures were on each page?

A. I couldn't say.

THE COURT: Any estimation?

A. About twenty-five to thirty. (Tr. 119)

THE COURT: . . . did you pick the picture out?

A. Yes, I did. (Tr. 120).

THE COURT: Did anyone suggest to you? (Tr. 121).

A. No one.

THE COURT: Anyone indicate?

A. No, they put two pictures in front of me. (emphasis added)

Q. They put two pictures?

A. Correct.

Q. After you had gone through all the photographs they finally came forward with two photographs, is that right?

A. They put two in front of me.

Q. And that was one of Mr. Suggs and the other one was of a man by the name of Clarence Blair, isn't that right?

A. Right.

Q. And Mr. Blair is a neighbor of yours, is he not?

A. Right.

(See Also Tr. 402, also 486).

After viewing the pictures and identifying one (the one of Suggs) Benson signed his statement in which he indicated that he was not sure of the identity of the one he had chosen.

Suggs was arrested at 8:50 p.m. on November 2 (the day following the robbery) (Tr. 767; 802).

The following morning (November 3; although the witness was at first unsure of the date, it was evidently November 3, Tr. 395; 466), Benson was brought to police headquarters again. Mr. Benson had evidently been apprized by the authorities that his second visit was for the purpose of identifying someone:

Q. What was the purpose of seeing them at that time?

A. The purpose was to go down and identify somebody. That was the purpose (Tr. 125)

* * * *

Q. And would you explain to his Honor what happened up in the robbery squad?

A. Well, I wasn't actually in the robbery squad. I was over in the fingerprint part of it. So when he walked by, that is when I identified him.

Q. You were outside?

A. I was sitting on the bench.

Q. And he was brought by you?

A. Right.

* * * *

Q. What did either the officer or the agent tell you the reason for you being there?

A. They said they wanted me to look at somebody.

Q. And did they indicate who?

A. No, they did not.

Q. Who was with Mr. Suggs at the time?

Q. How many people were with Mr. Suggs at the time that he walked by you?

A. Just one officer.

Q. One officer?

A. Right.

Q. How far was he from you?

A. He walked almost past me.

In the presence of the jury, the witness later elaborated(Tr. 466):

Q. Now, at that time was Mr. Suggs brought by you?

A. Yes, he was.

Q. Was anybody with him?

A. A detective.

Q. You knew the other man was a detective?

A. No, I did not.

Q. How do you know at this time that he was a detective?

A. Because he had him by the arm.

Q. And from the way he was being - he was being handled you just assumed that he was a detective; is that your

testimony?

A. Yes, sir.

(Later, Tr. 130, the witness replied No to the following question by the court: Did anyone, directly or indirectly, any police officer or any FBI Agent tell you, insinuate to you, that they were going to bring people walking by you and watch them? (See also 407))

The government presented evidence (testimony of officers Swart and Ford, Tr. 362 - 400) that there were in fact numerous loose photographs shown the witness (Tr. 380 and 364). Officer Ford furthermore testified (Tr. 382) that he had, on the following day (November 2) shown Benson another series of six photos, including one of Suggs which had been identified as one of the robbers.

The total effect of this series of suggestive identifications was (Tr. 393) a marked increase in the witness' certainty in his identification:

From the police report of the November 1 interview: Mr. Benson said the photographs of Suggs <u>in his opinion</u> looked like the man he saw jump from the platform carrying the satchel taken from Mrs. Sallade. (emphasis added).

From the interview report of the following day (after the identification procedures recited above): "Mr. Benson stated the photographs of James Lee Suggs <u>is the individual</u> he saw running from the platform . . . (emphasis added) (See also 460).

At the conclusion of the "Stovall" hearing, the Court denied trial counsel's motion to exclude the identification (Tr. 410) without articulating his reasons.

In the presence of the jury, Benson then testified that Suggs (pointing him out) (Tr. 423) was one of the men seen running from the scene, and (Tr. 424) that there was no doubt in his mind that Suggs was the person carrying the satchel. Upon interrogation by defense counsel, Benson reiterated that there were but two photos lying loose beside him at the time he was first shown photographs and first identified Suggs. (Tr. 447).

The Government's next witness, Robert Hardy, was also called for the purpose of identifying Suggs. He had been near the scene of the crime on the morning of November 1, and got a look at the three robbers as they fled (Tr. 498). He saw them get into Mutual Cab No. 57 and drive off. He testified as follows: (Tr. 501)

Q. Are you today able to recognize any of the people that got into the cab, Mr. Hardy?

A. The fellow that was carrying the briefcase, I could recognize him if I see him because I got a good look at him because he was the last one that got in the cab and I was there in plenty of time to see him when he got there.

Q. Did you look at his face?

A. Sure, I looked at him.

Q. Do you see him here in the courtroom now?

A. No, he is not in here.

* * * *

Mr. Caputy (for the Government): I declare surprise at this time.

At the bench, the government then proffered proof that the witness had made a previous statement to the authorities that "Mr. Suggs in his opinion looked similar to one of the three men seen running from the vicinity of the old pension building." (Tr. 507) During the ensuing hearing out of the presence of the jury, it developed that the same method of securing identification by Hardy had been employed as that used for Benson. Referring to his interview at police headquarters, the witness testified as follows:

Q. At that time when you saw [the agent] do you remember two individuals walking by and then saying something to this agent as the two individuals walked by? Do you remember that?

A. Yes, I remember (Tr. 506)

* * * *

(See also p. 510 - see, however, p. 519 in which the witness appears to contradict self as to number of persons and the manner of identification. At Tr. 543 the witness again refers to two people walking by).

* * * *

Q. And he walked by with someone else and you told the agent that he looked like one of the individuals you saw running although you couldn't positively state so? (Tr. 508)

A. Yes, I told him he favored the fellow driving the cab.

It developed that the witness, before the grand jury and during his various statements to the authorities stated variously that Suggs "favored" one of the men he saw or resembled" one, but never had the witness positively identified him as one of the robbers (Tr. 516 - 520). The witness had consistently declined to state that Suggs was in fact one of the robbers.

The government was then allowed to ask the witness if he saw in the courtroom anyone who looked like the man seen running from the Old Pension Building (Tr. 522) The witness at last replied by pointing to Suggs. The court then ruled that the government was, in fact, surprised (Tr. 524).

After the jury returned the witness immediately answered that he was able to recognize one of the persons seen running: Suggs "favors the fellow that was driving the cab" (Tr. 535, 536), but, (Tr. 536) he <u>could</u> positively identify the man seen <u>carrying the satchel</u>, and that he was not in the courtroom. Note that the previous witness, Benson, had testified unequivocably that Suggs was the one carrying the satchel. Later in the testimony of this same witness, the government again had to declare surprise (Tr. 549) and lead him as to matters concerning the height and complexion of the three men seen running. As to this, the court ruled that there was no surprise (Tr. 560).

The next witness was the third and last government witness brought on to identify Suggs. This witness, James Allgood, had been in Hardy's company at the time that he observed the robbers fleeing. (Tr. 563). According to <u>his</u> version of the story, there were <u>two</u> men seen leaving the scene of the crime, one of whom was carrying a little briefcase and running stooped over,

so that his height could not be estimated (Tr. 564 - 5). After probing about as to whether the witness had previously said three men, of whom the one with the briefcase was about 5' 10", the government once again declared surprise and sought to lead its own witness, and thereby prove its case by unsworn statements made out of court and not subject to corss-examination. Allgood was then asked whether he had previously given any statements to the FBI or police, and after persistent coaxing, admitted having described three men running, of whom the one with the briefcase was about 5' 10". It is abundantly clear (See Tr. 473-80) that this witness' recollection of the events was so befuddled and unclear as to be entirely worthless, and without any probative value.

The remainder of the Government's case against Suggs consisted in proving that (1) A green Cadillac was seen early on November 1 leaving the parking lot adjoining the apartment where co-defendant Harris lived, following closely Mutual Cab No. 57 (Tr. 584) (Cne of the witnesses as to this point was evidently not too sure of even this, since he identified incorrectly photographs of the two vehicles (Tr. 588-9)). No one placed or identified Suggs at that location though. (See Tr. 1581, stating only that three men were seen leaving Suggs' apartment by witness Norman); (2) Suggs was the owner of a Cadillac; and (3) Suggs' fingerprint (a partial print) had been found on one of the door handle push-buttons of Mutual Cab No. 57 shortly after its recovery an hour or so following the robbery (Tr. 820, et seq.). At the close of the government's case, Suggs' motion for acquittal was denied (Tr. 914).

The testimony introduced by Suggs consisted of his own testimony that he had taken his wife to the hospital for surgery and on the evening of October 31, the eve of the robbery he had been to the hospital to visit her (Tr. 1317). On his return, he picked up a young lady whose exact name was unknown to him, although he thought it was Alice, Agnes, or the like. They had proceeded to the New Hampshire Motor Inn for the night, and had a late breakfast with friends at the Pantry House Restaurant adjoining the motel the following morning. This breakfast began before and ended after the robbery (Tr. 1318 - 20). Corroborating this alibi were Reginald Payne (Tr. 1248, et seq.) and his companion, Gwen Carter (Tr. 1183, et seq.) who testified unequivocably that they had been present together with Suggs and his companion during the critical hour. Suggs asserted that he had registered at the motel under the name of Jimmie Out (Tr. 1318). He produced a keeper of motel records who produced registration records which confirmed that "Jimmie Cut" had indeed registered at the motel at the time Suggs claimed to have done so. (Tr. 1311). The signature on the guest card and an exemplar of Suggs' handwriting were examined by the jury (Tr. 1324).

Several witnesses were produced who stated that Suggs had been friendly with the co-defendant Harris, and that it was common for him to hire Harris' cab or to ride in it in connection with neighborhood basketball games in which both defendants frequently played (Tr. 1153, 1166, 1174). Counsel for Suggs pointed out, therefore, that no implication of guilt could be made of the appearance of a fingerprint of Suggs on the right front car door handle. The

government's expert witness on fingerprints had testified that the person last touching the door handle would have left the print in question since any subsequent opening of the door would have smudged off the print in question, replacing it with a new one. The print was, however, only partial, as the fingerprint expert acknowledged; and, therefore, according to the argument of the defense could have been placed there on an occasion prior to the robbery, and only partially removed by subsequent openings of the door.

Statement of the Case for Appellant Harris

At the outset of the trial, counsel for Appellant Harris moved for a hearing on the question of reasonableness of the delay in bringing this case to trial. Harris had been arrested the day after the robbery. In May, 1967 (following an initial dismissal of the case against him for lack of evidence, shortly following his arrest), Harris was indicted (Tr. 8). Harris moved in June, following the indictment, for dismissal for lack of a speedy trial, which motion was denied (Tr. 11). The prejudice asserted in the motion made at trial was than an important witness could not be located (he was, in fact, later located and testified on Harris' behalf) and that there had been a change in Harris' mental condition, and he now refused to talk to his attorney. This motion was denied (Tr. 12).

The evidence against Harris consisted of testimony by Harris' roomate, Sheppard, who testified that he had awakened Harris and his friend Spears, who had spent the night with Harris, at about 7:00 a.m. pursuant to the request of Harris or Spears. Sheppard was not sure that Harris had, in fact, left

the apartment by the time he (Sheppard) arose after 8:00 a.m., but assumed from the fact that he neither saw nor heard him (Tr. 634), that he had, in fact, left. Harris had been seen leaving his apartment, evidently in the company of two other unidentified men early on the morning during which the robbery occurred (Tr. 584); Harris had been seen entering the cab (Tr. 655) (which he was shown to drive for his occupation) and was followed by the other two men in a green Cadillac.

The robbery of the Credit Union funds occurred that morning shortly before 9:00 a.m. Three men were seen fleeing the scene with a briefcase full of money, and were seen entering Mutual Cab. No. 57. The alert for this auto was broadcast, and it was located parked along the street, vacant, a little after 9:00 a.m. (Tr. 666, 669). The car was turned over to the FBI, which had entered the investigation of the case since it involved theft from a Federal instrumentality.

Agent King of the FBI testified that he had obtained the description of the get-away car, and had traced its ownership to one Augustus Harris, Sr. He interviewed Harris, Sr., and as a result of this interview had gone, with another agent, to the home of Augustus Harris, Jr., the Appellant herein (Tr. 691 - 697).

Upon his arrival about 10:30 a.m. Agent King found Harris speaking on the telephone. Agent King told Harris he was making an investigation of a cab that had been reported stolen, whereupon, he learned from Harris, that Harris was at that moment speaking with an officer of the D. C. Police Force, with the purpose of reporting his cab stolen. Counsel now brought forth the

Agent's report, and elicited testimony that Harris had told him at that time that he had thought there was some possibility that his car had been repossessed (Tr. 708). Following this, the government proceeded to disclose the entire contents of that report, which included a report that (Tr. 709) Harris claimed to have last seen his car about 3:00 a.m. that morning, and that when he left his apartment about 7:30 in the morning to go to work, he had found the car missing.

The telephone call to the police, interrupted by the FBI, is reported thus by the police dispatcher to whom Harris was speaking (and to whom Agent King also spoke, when he found out who was on the other end of the line):

A. Harris told me what kind of cab it was. He said it might have been repossessed, wanted me to check. And at that time somebody was at the door.

Q. And who was at this front door, according to Harris?

A. Two F. B. I. agents. (Tr. 723)

* * * *

Q. You say you received this call at what time?

A. 10:30 a.m.

Q. What time did you put out the broadcast?

A. It did not go out on broadcast.

Q. Why didn't you put it out on broadcast?

A. Because the car was not stolen.

Q. Did you -

A. <u>Agent King advised me that the car had not been stolen.</u>

(emphasis added).

Harris' motion for acquittal at the close of the government's case was denied.

Harris' friend, Spears (who had spent the night of October 31 in his apartment) testified that upon arising on November 1, Harris reported that he could not find his cab (Tr. 919); that the pair went back out to the parking lot and spent some time looking for it, but Spears left for work about 7:40 - 7:45, without their having found the cab.

ARGUMENT : SUGGS

(A) It was Error To Permit In-Court Identification Of Suggs

The manner in which Suggs was identified by government witnesses was so impermissably suggestive as to give rise to a very substantial likelihood of irreparable mis-identification. This is the criteria by which reversible error in allowing identification testimony is to be judged according to Simmons v. United States, 390 U.S. 377 (1968). During the extensive "Stovall" hearing that took place out of the jury's presence, and after the court's ruling, before the jury as well, the following facts were developed. During the hearing, the Court concerned itself primarily, if not solely, with the question of whether any official made any overt indications to the witness as to which of the pictures or persons were suspected by the officials. The court never considered whether the procedures themselves were so fatally flawed as to lead to irreparable harm. Neither did the trial court make any finding or determination that the in-court identification that followed was tainted by the illegality of the prior identifications.

> "Where the prosecution intends to offer only an in-court identification, the defense may challenge its admissibility. The court should then, on facts elicited outside the presence of the jury, rule upon whether a pre-trial identification by the same eye-witness is violative of due process or the right to counsel. If a violation is found, the court should then decide whether the in-court identification is still admissible because it has an independent source; indeed, it would appear in the interest of expeditious judicial administration for such a ruling to be made in any event. If the judge regards only the in-court identification as admissible, in the trial to the jury thereafter, the defense may, as a matter of trial tactics, decide to bring out the pretrial confrontation itself, hoping that it can thus detract from the weight the jury might otherwise accord the in-court identification." Clemons v. United States _____ U.S. App. D.C.-- 408 F.2d 1230, (1968) (emphasis added).

The most important identification witness used by the government in this case, Julius Benson, made his first tentative identification of Appellant from photographs shown him at police headquarters on the morning and afternoon of the day of the crime. Although the government sought to contradict its own witness as to this crucial point, [1] it is clear that witness Benson was aware of seeing only two loose photographs along with the several volumes of mounted photographs. [2] Of the two pictures, one was of the Appellant, and another was of a man the witness recognized as a neighbor of his.

1/ Testimony of Officer Swart, Tr. 365; testimony of Officer Ford, Tr. 380.

2/ Benson states categorically that he saw but two loose photographs in a number of places. See Tr. 121; 402; 447; 486.

The fact that the witness remembers with such apparent clarity viewing only two loose photographs in the face of contradictory indications by the interviewing officers points up the very reason why photographic identification procedures should be subject to the searching scrutiny of the courts. Such procedures may be subject, even innocently, to the danger of subtle suggestions to the witness concerning a target suspect.

In this case, furthermore, the influence of the improper initial identification method was augmented by the procedures which followed. On the day following the robbery, the witness was again called to headquarters, where he viewed a group of six photographs and identified the one of Appellant. By this time, by virtue of the prior suggestive identification, Appellant was certainly suspected by the officials, and the renewed viewing could have no purpose other than to fix more firmly in the witness' mind the image of the suspect. This procedure could have no legitimate purpose. Its effect was necessarily prejudicial. As a widely-cited work on identification of criminal suspects has said, "Where the suspect is known and in custody, however, the showing of photographs to the witnesses is usually improper, even when the procedure used in showing them is a fair one [footnote omitted]. This point has been made in a number of English and Commonwealth cases. In one, for example, the Court of Criminal Appeals stated that:

> "No doubt there are circumstances in which the police of necessity make use of photographs, but to make use of photographs beforehand to see whether important witnesses can identify an accused person whom they are afterwards going to see is to pursue a course which is not a proper one.

> Indeed, it is impossible to see what legitimate purpose such preliminary examination could fulfill or could be expected to fulfill." Wall, Eye Witness Identification In Criminal Cases.

In this case, the suspect was not in custody at the time of the second showing (he was arrested that evening; Tr. 767, 802) but he was certainly suspected. Absent some legitimate purpose for failure to employ a conventional line-up identification, it was certainly improper to butress the witness' tainted prior identification by showing him more pictures.

The danger involved in improper photographic identification techniques is not merely theoretical. It is fully comprehended by the Supreme Court, and this court. In Simmons v. United States, 390 U.S. 377 (1968), the Supreme Court, per Harlan, J., stated:

> "It must be recognized that improper employment of photographs by police may sometimes cause witnesses to err in identifying criminals. A witness may have obtained only a brief glimpse of a criminal, or may have seen him under improper conditions. Even if the police subsequently follow the most correct photographic identification procedures and show him a number of individuals without indicating whom they suspect, there is a danger that the witness will make an incorrect identification. This danger will be increased if the police display to the witness only the picture of a single individual who generally resembels the person he saw, or if they show him the pictures of several persons among which the photograph of a single individual is in some way emphasized." 390 U.S. at 383. (emphasis added.)

To show a witness two loose pictures, one of which is the suspect and the other a neighbor of the witness, along with volumes of mounted photographs is precisely the sort of emphasis on a single individual condemned

by the Court in Simmons. Even if the trial court and jury believed that "numerous" rather than only two loose photographs were actually shown, it cannot be disputed that the witness himself was so drawn to the two that he was unaware of the others; and hence, one must conclude that the showing was unfairly defective.

The Simmons court stated that when a defective identification technique was employed, the trustworthiness of subsequent line-up or court-room identifications was diminished because the witness will tend to reaffirm his previous statements.[3/] This principle was recognized by the court in Wade when it stated that:

> " . . . [i]t is a matter of common experience that, once a witness has picked out the accused at the line-up, he is not likely to go back on his word later on, so that in practice the issue of identity may (in the absence of other relevant evidence) for all practical purposes be determined there and then, before the trial." (388 U.S. at 229).

Simmons declined to find under the facts of that case that the photographic identification procedures were so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification.", holding that each case must rest on its own facts, and pointing out the following circumstances in that case that required or allowed a photographic identification: the perpetrator of the crime was still at large; there was little chance of mistake

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3/ United States v. Wade, 388 U.S. 218 (1967).

since the witnesses had a period of five minutes to observe the criminals in a well-lighted bank; and a series of at least six photographs were shown.

In the instant case, none of these factors was present. The witness had only a fleeting glimpse of the suspect as he fled; he was shown (in reality) only two photographs in the first occasion; and after the first identification by photographs, the suspect was being sought and no further photographic identification would result in faster apprehension of the suspect.

Even if the identification procedures discussed above are not found to be so defective by themselves as to deny Appellant his constitutional right to a fair trial in the light of the in-person identification which followed, Appellant is certainly entitled to a finding that no subsequent in-court identification could be free of the taint of prior suggestive identifications. For the day following the second photographic identification, the witness was called into Headquarters for the announced purpose of viewing a suspect. He was seated in a hallway and the suspect was brought by him in the custody of a detective. At one point, the witness says that many people walked through the area (Tr. 126) but we do not know whether there were any others that the witness had reason to believe were in custody or under suspicion. It is, however, abundantly clear that the witness assumed that Suggs was under suspicion of something, because of the following colloquoy taking place in the presence of the jury: (Tr. 466)

Q. Was anybody with him?

A. A detective.

Q. You knew the other man was a detective?

A. No, I did not.

Q. How do you know at this time that he was a detective?

A. Because he had him by the arm. (emphasis added)

Q. And from the way he was being - he was being handled, you just assumed that he was a detective; is that your testimony? (emphasis added.)

A. Yes, sir.

This procedure occurred before the decision of the Supreme Court in United States v. Wade, supra, and therefore, the admonitions of the Supreme Court that the Constitution requires the presence of counsel at any crucial confrontation of the accused and the accuser, is not advanced by Appellant. Stovall v. Denno, 388 U.S. 293 (1967). The latter case holds, however, that even though a per se rule would not be followed with respect to confrontations in absence of counsel, that nevertheless, a pretrial identification must not be so unnecessarily suggestive and conducive to irreparable mistaken identification that the defendant was denied due process of law."

It has been widely recognized that the mere lack of a line-up - the so-called one-man showup - does not in itself produce the sort of prejudice that is described by Stovall. Thus, when the witness is gravely injured and must make the identification immediately or not at all, the identification is considered permissible. Also, in Bates v. United States, 405 F.2d 1104 ---- U.S. App. D. C. --- (1968), an identification of a suspect by a witness who was being carried off in an ambulance minutes after the commission of the crime was held permissible. This court stated that there is no prohibition against the one-man show "when this occurs near the time of the criminal act."

(405 F.2d at 1106) U.S. App. D.C. , but went on to state that absent a special reason, the line-up is "the appropriate procedure." 4/ In this case a line-up was a feasible alternative. In fact, according to defendant Suggs (Tr. 1328):

> " . . . time passed and that morning came around, and I think it was between 9:00 and 10:00 o'clock. They was getting everybody out because they had a line-up. We was going to this room for a line-up. They say they didn't want me and Payne to go in the regular line-up."

This court has had a number of recent occasions to review the status of non-line-up identifications that have been arranged by the authorities. Such arrangements include stationing the witnesses in court for the arraignment of a number of suspects, and instructing the witnesses to "see if they can identify anyone." These various procedures (not unlike the one in the instant case) have been uniformly condemned as unsatisfactory, and warranted only under special circumstances. Not all such cases result, however, in reversals, because although unsatisfactory, one the peculiar facts of each case, they do not amount to a deprivation of due process of law under the relevant standard of constitutional error. Sera-Leyva v. United States, U.S. App. D. C. No. 20619 (97 Wash. L. Rep. 505).

4/ See also Russell v. United States, 408 F.2d 1280, -- U.S. App. D.C. --- (1969) in which this court stated: "We wish to make clear that the holding of this case approves only those on-the-scene identifications which occur within minutes of the witnessed crime." 408 F.2d at 1284.

Cunningham v. United States, U.S. App. D. C./ Hawkins v. United States, U.S. App. D. C. No. 21450 (97 Wash. L. Rep. 497) / Mason v. United States, U.S.App. D. C. No. 20955 (96 Wash. L. Rep. 1565), (97 Wash. L. Rep. 1333)

It is the contention of the Appellant, that the suggestive in-person confrontation, following the suggestive photographic identifications rendered the witness' testimony so tainted as to be incurable; and the trial court erred in not so finding and in denying the motion of the defense to suppress the in-court identification.

Clemons, Clark and Hines v. United States, 408 F.2d 1230, --U.S. App. D. C. --- (1968) decided by this court en banc provides perhaps the most all-inclusive view of the status of illegal identifications it is submitted that this case requires reversal under the foregoing facts.

In conclusion, the trial court did not - nor could it have, under the facts of this case - determine either that the pretrial confrontations were not illegally suggestive under the relevant criteria; nor did it determine that the in-court identification had sufficiently independant source so as to be absolved of the taint of the primary illegality.

B. It Was Error To Allow The Government To Introduce Evidence Of Pretrial Statements To Be Used By The Jury As Evidence Of Guilt When They Had Been Introduced To Refresh The Recollection Of The Government's Own Witness By Whom It Claimed To Be Surprised.

Following the testimony of witness Benson, the government called two other identification witnesses, Hardy and Allgood. The testimony of both of these witnesses was marked by such a lack of precise recollection that cross-examination of them was effectively impossible. Moreover, both of them on

the stand made statements contrary to pretrial statements, with the result that the government claimed surprise and sought to lead the witnesses. This proceeding was unfair because it had the effect of allowing the government to prove its case out of pretrial reports.

D. C. Code Section 14-107 provides that "When the court is satisfied that the party producing a witness has been taken by surprise by the testimony of the witness, it may allow the party to prove, for the purpose only of affecting the credibility of the witness, that the witness has made to the party or his attorney statements substantially variant from his sworn testimony about material facts in the cause . . ." (emphasis added).

In this case, the jury was never instructed that the prior statements could be used for impeachment only. Following the second of the three times that the government declared surprise, the court instructed the jury as follows: (Tr. 550)

> "Ladies and gentlemen of the jury, in a trial of a case, counsel for any party, if they have in their possession - one of the duties of counsel representing defendants or representing the prosecution, is that they investigate the case, they talk with witnesses. Now, in the event that a witness takes the stand and testifies in a manner that is contradictory to information which has already been given at a prior date the counsel may announce surprise and he then has the right, so far as bringing out any testimony is concerned, to ask what is known as leading questions.
>
> "And the court will now rule that the counsel for the government has announced surprise. And he may ask this witness questions pertaining to any information given at a prior time."

The prosecution proceeded (Tr. 552 - 559 especially p. 557) to question the witness at length regarding a prior description in which the witness (contrary to his present testimony) had given rather complete descriptions of the suspects.

In his charge to the jury at the conclusion of the case, the court instructed as follows (Tr. 1607 - 8):

> Also, ladies and gentlemen of the jury, in this particular case, as the court recalls, there was a question of a witness taking the stand and counsel indicated surprise. Now, the counsel have the right naturally to interrogate witnesses, their own witnesses, prior to the time they testify, or to become familiar with the testimony which they are to testify to a jury. In the event that a witness takes the stand and testifies contrary and counsel indicates that he is taken by surprise, then it is within the discretion of the Court to allow the counsel whether it be for the prosecution or for the defense, the right to ask that particular witness leading questions, indicating or referring to what constitutes the surprise. The Court does not recall but the Court's recollection was that there was at least one witness where surprise was announced, and the court merely wanted to bring that to your attention to clarify it for you."

These are the only two charges on surprise, and nowhere in either does it appear that the jury was admonished to accept the statements as bearing only on the credibility of the witnesses; nowhere is the jury told that the contents of those statements are not to be used as evidence.

Unfortunately, the omission in this case cannot be assumed to pose remote or merely theoretical danger of unjust conviction. A reading of Transcript pages 497 to 580 veveals that the memories of witnesses Allgood and Hardy were so impaired by passage of time that their testimony as to present

recollection was almost totally lacking in probative value. As a consequence, the jury (not being otherwise instructed) must have assumed that the witnesses had been able to make their descriptions of the assailants with some assurance on previous occasions. Even when confronted with their previous statements, the witnesses had no very certain recollection (Tr. 572, with respect to Allgood: Q. Did you give the police department a statement? A. I don't remember I did.")

As a result of this unfair proceeding, with no corrective instructions from the judge, the jury was informed of previous identifications and descriptions of Appellant Suggs - which identifications and descriptions were effectively removed from the realm of cross-examination by the erosion of the witnesses' memories. The unfairness would be critical enough even had the statements been limited to impeachment to repair the inroads the government's own witnesses had made on its own case. But absent the limiting instruction, the witnesses' lapse of memory served as a positive benefit to the government's case, as it allowed them to get the pretrial identifications before the jury.

In Gaines v. United States, 349 F.2d 190, 121 U.S.App.D. C. 213 (1965), in a similar case in which the prosecution had been surprised by two of its witnesses, this court, held, per curium, that it was error to permit the jury to hear the pretrial statements of the witnesses (which had been read to the witnesses to refresh their recollections). "This is liable to cause the jury to consider their contents as evidence notwithstanding instructions to the contrary. 349 F.2d at 292 , 121 U.S.App.D.C. at 215 / In that case, in view of the repeated instructions by the court that the hearsay statements were not to be

used as evidence, the error was held not to be serious enough to warrant reversal. In Belton v. United States, 259 F.2d 811 (1958), 118 U.S. App. D. C. 313 reversed, en banc , a conviction resulting from the prosecutor's repeatedly asking his witness leading questions (contrary to the instruction of the court, who had ruled that he was not in fact surprised) on the grounds that this procedure unfairly lead the jury to believe that there were prior statements more damaging to the accused than those which the government had elicited at trial. This violated the Appellant's right "to a trial on the evidence given under oath from the witness stand rather than given in effect by the prosecutor from the counsel table." 259 F.2d at 814,

See also Young v. United States, 214 F.2d 232, 121 U.S. App. D. D.215 (1954) ; Robinson v. United States, 308 F.2d 327, 118 U.S.App. D. C., 233 (1962); Carnnad v. United States, 351 F.2d 796, 123 U.S.App. D. C., 128 (1965)and Troublefield v. United States, 372 F.2d 912 , 125 U.S.App. D. C. 339 (1966)all of which set out criteria for admission of prior statements by a "surprise" witness, emphasizing the need for careful limitation by instruction to the jury.

Under any standard for guaging harmless error, it is clear that the error adverted to above was not harmless. Here is a case where, because of the weakness of the government's case, every shred of evidence that the jury considered was certainly crucial. It is possible for the court to say with fair assurance that the verdict of the jury was substantially swayed by the error. Kotkeotos v. United States, 328 U.S. 750 (1946). A fortiori, there is a

reasonable possibility that the evidence complained of might have contributed to the conviction (Fahy v. Connecticut, 375 U.S. 85 (1963)), or that the evidence does not beyond a reasonable doubt appear to be harmless (Chapman v. California, 386 U.S. 18, (1966)

Indeed, it seems scarcely likely that the trial court could have found this error harmless under any standard. Note his comments (Tr. 621):

> "THE COURT: My particular point is practically every witness so far as I am concerned is not testifying in accordance with information that you have had."

ARGUMENT: HARRIS

A. The Trial Court Erred In Not Granting The Appellant's Motion For Acquittal Where The Government's Proof Was Too Weak To Establish Appellant's Guilt.

Reduced to its essentials and viewing the testimony in the most unfavorable light to the Appellant,[5/] the government's case against Appellant Harris consisted only in a showing that Harris was the usual operator of the get-away car; that he left his home abaout 7:30 a.m. on the morning that the crime was committed in the company of two other men; and that he falsely stated that his car had been stolen that morning and that he had not left his home about 7:30. That is the most the jury could have believed from the testimony, assuming that they believed all of the government's case, and none of Harris' (The arguments of counsel found at Tr. 901 - 909 fairly summarize the evidence.)

Appellant Harris submits that this is simply not enough proof to justify sending a case to the jury. There is simply not enough material here to warrant a finding of guilt beyond a reasonable doubt.

Campbell v. United States, 316 F.2d 681, 115 U.S. App. D. C. 30, (1963) reversed (with a dissent) a conviction on the grounds that there was not sufficient evidence. Citing Cooper v. United States, 218 F.2d 39, 94 U.S. App. D. C. 343 (1954), the court stated: "guilt according to a basic principle in our jurisprudence, must be established beyond a reasonable doubt. And unless that result is possible on the evidence, the judge must not let the jury act;

5/ In accordance with the recognized rule that the trial judge must permit the jury to draw all reasonable inferences against the defendant and in favor of of the government. Bates v. United States, 95 U.S. App. D. C. 57, 219 F.2d 30, cert. denied. 349 U.S. 961 (1955); Rowe v. United States, 125 U.S. App. D. C. 218, 370 F.2d 240 (1966).

he must not let it act on what would necessarily be surmize and conjecture without evidence." 115 U.S. App. D. C. at 32.[6/]

At the close of the Government's case, Appellant's motion for acquittal was denied.[7/] (Tr. 909). "On a motion of acquittal, the Court must determine whether the evidence, giving full effect of the right of the jury to determine credibility, weigh the evidence, and draw justifiable inferences of fact, a reasonable mind might fairly conclude guilt beyond a reasonable doubt." United States v. Kelly, 119 F.Supp. 217 at 219 (D.C.D.C. (1954)). It is submitted that on the basis of this evidence, the suspicion of a reasonable man might be aroused regarding the complicity of Harris in the crime; but that no reasonable man could satisfy himself beyond a reasonable doubt as to the existence of all of the essential elements of the crime. Austin v. United States, 127 U.S. App. D. C. 180, 382 F.2d 129 (1967). Culey v. United States, 160 F.2d 229, 81 U.S. App. D. C. 389 (1947), cert. denied 331 U.S. 837.

Consider now the facts and holding of Cooper v. United States, 218 F.2d 39, 94 U.S. App. D. C. 343 (1954). In this case the defendant was convicted of robbery. This court held the following evidence was insufficient

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6/ A propos of a different section of this brief, in this case the Allen charge was given, and the court criticized its use under the circumstances.

7/ Presumably the motion was made invoking the court's power under the Federal Rules of Criminal Procedure, 29 (a).

and reversed for the trial court's error in denying the motion for acquittal. The defendant was purchasing a car which was registered in the name of a co-defendant. This car was positively identified as the car the robbers were seen fleeing in and Cooper's fingerprint was found in it. The co-defendant was identified by various eye-witnesses; but they were unable to identify Cooper. Cooper, evidently conceiving himself in danger of prosecution requested of his cousin that he falsely testify that Cooper was in a different city at the time of the robbery. This was the sum total of the evidence against the defendant. The court's conclusion merits repetition in this case:

> "It is clear to us that upon the evidence in the case at bar a reasonable man must necessarily have had a reasonable doubt as to Cooper's guilt. The total absence of any semblance of direct proof against Cooper, in the presence of so much direct proof as to the robbery and the robbers, must, we think, make a reasonable man have a reasonable doubt upon the evidence as it stood. That the get-away car was being bought by Cooper, that he was a friend of [the co-defendant], who was clearly one of the robbers according to this record, and that he asked his cousin to corroborate his being in North Caroline, create suspicion. Such evidence might raise a question in a reasonable man's mind. But that is not enough." 94 U.S. App. D. C. at 345.

The striking parallel between Cooper and the case at bar needs no extended discussion. Suffice it to say that the fact of Harris' leaving his apartment with two other men is certainly not damning; the fact that his car was used is equally not probative of guilt; and the fact that the jury may have believed Harris falsely reported that his car had been stolen sometime the previous evening is merely indicative of the fact that he may have been

panic-struck at being implicated in a major crime [8] - this he could have learned from his father, with whom FBI agent King spoke prior to going to Harris. This hypothesis is not only possible, but is clearly consistent with innocence. In combination with the other factor - absence of direct proof - this would compel a reasonable man to entertain a reasonable doubt.

Other strong examples of the duty of the courts to refrain from allowing juries to speculate on the meaning of inconclusive evidence are cases where the only evidence against the defendant is his fingerprint found at the scene of the crime. Hiet v. United States, 365 F.2d 504, 125 U.S. App. D. C. 338 (1966). Borum v. United States, 380 F.2d 595, 127 U.S. App. D. C. 48 (1967). Cephus v. United States, 324 F.2d 893, 117 U.S. App. D. C. 15 (1963). In these cases, this court held that the mere fingerprint placing the defendant at the scene of the crime at some unspecified time, although suspicious, does not warrent a verdict of guilty, as to the commission of the crime. In the instant case, Harris was not placed at the scene of the crime at all - nor was he placed anywhere within the vicinity - nor was there any indication given of any intention to go there. He was not shown to be in the company of the co-defendant on that day. [9] Although three witnesses saw the robbers close enough to be able to identify or describe them, none could identify Harris.

8/ "His plea to her is as explainable by terror at his plight as by guilt." Cooper, 94 U.S. App. D. C. at 345.

9/ Even if such a showing had been made, it would not have been sufficient to overcome the weakness of the case. Campbell v. United States, 115 U.S.App. D.C. 30, 316 F.2d 681 (1963) in which defendant's close association both before and after the commission of the crime with the co-defendant who was conclusively proven guilty was held not to justify conviction - even in the fact of additional circumstances tending to arouse suspicion.

As this court has articulated in Carter v. United States, 102 U.S. App. D. C. 227, 252 F.2d 608 (1958), unless there is substantial evidence of facts which exclude every reasonable hypothesis but that of guilt, the verdict must be not guilty, and that, where all the substantial evidence is consistent with any reasonable hypothesis of innocence, the verdict must not be guilty." 10/ (102 U.S. App. D.C. at 231.)

In conclusion, the relevant criteria for taking the case from the jury by a judgment of acquittal require reversal of Harris' conviction.

B. The Trial Court Erred In Allowing Evidence Of Harris' Statements To Get Before The Jury.

When the FBI was called in to investigate the robbery, it immediately sent Agent King to trace the get-away car and interview the owner. Agent King called at Appellant Harris' apartment about 10:30 a.m. on November 1, 1966, the morning of the crime. He identified himself and stated to Harris that he was investigating the theft of an automobile. This was presumably false, since he told the Metropolitan Police Department dispatcher a few minutes later by telephone that the car had not been stolen.

As to the ensuing conversation, we know very little, except that according to the Agent's report Harris was reporting the car stolen; and he had last seen the car about 3:00 a.m. that morning. This statement was evidently disbelieved by the jury. If it had been believed there would have been no

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10/ See also Hunt v. United States, 115 U.S. App. D. C. 1, 316 F.2d 652 (1963)

evidence at all connecting Harris with the crime. If disbelieved, however, the jury may have assumed the statement was a part of a previously contrived means of clearing the Appellant - and as such the statement was incriminating, even though its purport was exculpatory.

Defendant contends that since the record does not disclose the circumstances under which the statement was given, he is entitled to reversal of his conviction because the government did not meet its burden under Miranda[11] and its progeny of demonstrating that the requisite constitutional safeguards attended the taking of Harris' statement.

The fact that Harris no doubt considered his statement exculpatory does not alter the result. "[N]o distinction may be drawn between inculpatory statements and statements alleged to be merely 'exculpatory.' If a statement made were, in fact, exculpatory, it would, of course, never be used by the prosecution. In fact, statements merely intended to be exculpatory by the defendant are often used to impeach his testimony at trial . . . These statements are incriminatingin any meaningful sense of the word, and may not be used without full warning. Miranda v. Arizona, 384 U.S. at 477)[12].

Nor is the fact that the statements were not coerced in the physical sense germane. Miranda fully recognized that confessions extracted by fraud or artifice were invalid equally with ones coerced in a more brutal fashion. This rule is recognized and applied in this jurisdiction. See Fuller v.

11/ Miranda v. Arizona, 384 U.S. 436 (1966).

12/ See also Escobedo v. Illinois, 378 U.S. 478 (1964) in which the "confession" was really an "exculpatory" statement.

United States, 407 F.2d 1199, ---U.S. App. D. C. ---- (1968): "Of course garnering a confession by artifice is no more permissible than achieving the same result by coercion." 407 F.2d at 1213.

Here, the FBI agent confronted Harris in his home, and by falsely asserting that he was investigating the car theft, invited Harris to weave a net in which he would be caught. By the time the agent arrived at Harris' home, he must have suspected Harris in some degree. His investigation was, therefore, no longer within the realm of general investigatory interrogations. He had focused on a single suspect, Harris. The investigation had reached the point where, by Escobedo (supra) the suspect was entitled to a warning as to his rights.[13/] The record does not disclose any such warning. Nor do we know from the record whether Harris was actually deprived of his freedom of action in any respect by the agent (which would be the point at which the warnings would be required under Miranda). In short, we know virtually nothing about this fateful interview.

Now it is clear in this jurisdiction that for the government to profit by introduction of the accused's own words in the case against him, the government must first establish that so doing does not encroach upon the accused's fundamental freedoms. In Pea v. United States, 397 F.2d 627, 130 U.S. App. D. C. 66, (1967) this court held, in the exercise of its supervisory power over the administration of Federal Criminal justice in the District of Columbia, that a confession can not be admitted unless the judge first

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13/ A finding that police inquiries were "of a general nature, not directed at [appellant], not focused on her as a suspect" was found germane to a question of voluntariness raised in Hicks v. United States, 382 F.2d 158 127 U.S. App. D. C. 209 (1967)

satisfies himself beyond a reasonable doubt that the confessions was voluntary.[14]

Only last month this court, in a supplemental opinion in Allen v. United States, U.S. App. D. C. No. 20955 (96 Wash. L. Rep. 1565) reiterated that in the case of on-the-street questioning without Miranda warnings, "the court can not accept such statements in evidence unless it is affirmatively satisfied that they were not proceeded or accompanied by custodial interrogation." (96 Wash. L. Rep., 1528). It is submitted that the same conclusion is required for this case, even though the interrogation in this case was not "on-the-street".

In this case, of course, not only was such a finding never made by the judge, but it was never even made by the jury. Details of the confrontation which resulted in the "exculpatory" statement are totally lacking on the record.[15] It is improper to assume, therefore, either that Harris' liberty was not sufficiently restrained so as to bring into play the requirements of Miranda; or that an intelligent waiver was made.

ARGUMENT: HARRIS AND SUGGS

A. The Court Erred In Denying Defendants' Motions To Dismiss The Case For Lack Of A Speedy Trial.

The offenses for which the Appellants were convicted occurred on November 1, 1966. Appellant Suggs was indicted for that crime in January, 1967,

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14/ See also Jackson v. Denno, 378 U.S. 368 (1963) outlining a slightly less stringent standard required by the Constitution.

15/ Agent King's testimony - the only source of information about the interview, is found at Tr. 691 - 727.

(after one grand jury had ignored the case). On March 4 of 1968, Suggs filed his pro se motion for dismissal for lack of a speedy trial,[16/] alleging that he was already at that time prejudiced because he had grown out of touch with his witnesses. The trial that is the subject of this case did not commence until eleven months after Suggs first moved to dismiss for lack of trial; that was more than two years since he was indicted; and about twenty-seven months after the alleged offenses occurred.

As to Appellant Harris, the facts are similar; and if anything reflect an even greater diligence in seeking a speedy trial. After a preliminary hearing on November 17, 1966, the government dismissed the case against Harris for lack of sufficient evidence. Harris was indicted the following May, and he promptly moved (in June) to dismiss for lack of speedy trial (Tr. 8 - 11). Since that time, the District Court docket entries do not reflect any delay in trial caused by Appellant Harris except a one-week delay in hearing the above-mentioned motion of June, 1967 to dismiss.

Appellants do not contend that the mere lapse of time warrant an automatic conclusion that justice has been thwarted by lack of speedy trial; they contend that under the circumstances of this case, the lapse of time immeasurably weakened their ability to defend themselves and that they are, therefore, entitled to reversals of their convictions.

16/ The motion to dismiss should be treated (when denied) as a request for a speedy trial. See Mathies v. United States, 126 U.S. App. D. C. 98, 374 F.2d 312 (1967).

The factors which Appellant Suggs submits to bear on this question are as follows:

1. Suggs asserted his right to speedy trial almost a year before he was actually tried - at a time when enough time had elapsed to warrant dismissal of the charges at that time. Appellant did not sit on his rights.

2. According to the representations of counsel in making the motion, two crucial defense witnesses had become hostile during the time between the offense and the trial, and had indicated that they would testify only under judicial compulsion. As to one of these witnesses, Harold Cross, the record does not disclose what would have been the effect of his testimony except counsel's representations that he would be able to impeach the government's primary witness (Tr. 13). The other witness who refused to testify voluntarily was Alice Roper - presumably the one with whom Suggs claims to have spent the night preceding the date of the robbery and in whose company he claims to have been breakfasting during the hours when the crime was being committed. It is certainly plausible (although the record does not disclose any facts in this connection) that she had formed other allian ces and for personal reasons might be extremely reluctant to parade publicly her derelictions of over two years before. Suggs' ability to present his defense was thus seriously impaired by the lack of a speedy trial.

3. The government's witnesses, for the most part uncertain in the first place, had become less certain. The fact has been adverted to at length in a previous section of this brief.

4. The memories of Suggs' witnesses were impaired. Of crucial importance to Suggs' defense was his alibi witness Gwen Carter, who testified that she had eaten breakfast in his company while the robbery was being committed later seriously impeached herself by stating that she saw Suggs periodically over the next couple of days - times when the jury knew full well that Suggs was in jail. Such a lapse of memory over two years should not be considered unusual, but in this case, it may have seriously weighed with the jury.

5. Suggs himself was responsible only for a minimum of the delay. Inspection of the District Court docket will reveal that the only delays sought by Suggs were a one-month continuance of the trial granted on October 11, 1968; and a motion for brief continuance sought (and denied) in early February, 1969.

All of these factors were adduced by counsel in his motion at the opening of trial; and while the trial court may be excused for not acting on them at that time, since he had no real way of knowing to what extent the defense would be impeded, he should have granted the motion at some time during the course of the trial when it became clear that the delay had caused prejudice.

In the case of Harris, the following facts bear on the question of whether the delay was undue and therefore prejudicially unfair.

1. Harris asserted his right to a speedy trial over a year and one-half before he was actually tried - seven months after the offense was committed. He did not sit idly on his rights.

2. At trial, counsel represented to the court during the making of the motion to dismiss, Harris had lost touch with a critical witness, Spears, and

had been totally unsuccessful in finding him (Tr. 11). Although Spears was later located by the government and appeared as a witness, the prejudice resulted from counsel's inability to locate and interview him prior to trial and map a trial strategy or assemble other witnesses accordingly. This prejudice was caused by the delay in trial.

3. The testimony of the witnesses who claimed to have seen Harris leave his home on the morning of the crime was for the most part sketchy and inconclusive. The events they described were so prosaic that one could not expect anyone to retain the details firmly in mind for a period of over two years - yet were of pivotal importance to the government's case. Likewise the testimony of Harris' roommate, Sheppard, is indefinite as to what time Harris actually left the apartment (Tr. 610 - 630).

4. Harris was himself not responsible for any appreciable delay.

In the case of Bynum v. United States, 408 F. 2d 1207--- U.S. App. D. C.--(1968) , the court stated "This delay [537 days] is too long - too long to be viewed with equanimity and long enough to establish a prima facie case of undue delay". In that case, however, the speedy trial issue arose for the first time in the appeal; it had not been raised in previous proceedings - and the court found a lack of any significant basis for the claims of prejudice, since the main witnesses had had the events whereof they testified etched in their memories with sufficient clarity that no major impairment of their ability to testify was noticed.

In the instant case, of course (in addition to presenting a delay longer than that found to be a prima facie case of undue delay in Bynum) the

issue was strenuously posed in proceedings below; and there is substantial basis for the claims of prejudice.

Williams v. United States, 250 F.2d 19, 102 U.S. App. C. C. 51 (1957) stands for the proposition that where the delay has been substantial, the government must show (at least) that the accused suffered no serious prejudice beyond that which ensued from the ordinary and inevitable delays. No such showing was offered by the government when Appellant's motion was advanced, nor, it is submitted, could such a showing be made.

This court has, at various times declined to upset convictions in which the Appellant had alleged prejudice due to lack of speedy trial. See, for example, Stevenson v. United States, 278 F.2d 278, 107 U.S. App. D. C. 398 (1960) (no prejudice shown); Turberville v. United States, 303 F.2d 411, 112 U.S. App. D. C. 400 (1962), (no timely objection to delays; no prejudice shown); Booth v. United States, 343 F.2d 321, 120 U.S. App. D. C. 33 (1965), (delay was only three and one-half months), etc. No case has been found where the court has declined to upset a conviction for lack of speedy trial where all of the factors as enumerated above obtained.

It is, therefore, submitted that the facts of this case warrant reversal of the convictions due to lack of speedy trial.

B. The Trial Court Erred In Delivering The "Allen" Charge In This Case.

When the jury had deliberated together for some twelve hours, and had had a full weekend during which to search their consciences individually, the judge, over the objections of counsel for Appellants delivered to the jury the "Allen" charge,[17/] telling them in effect that a minority should weight carefully the arguments of a majority of equally honest and intelligent jurors. Under the circumstances, both Appellants were prejudiced by this charge.

The charge marks the outer limit of the court's province in encouraging the jury to agree on a verdict. See Brasfeld v. United States, 272 U.S. 448 (1926). Bunton v. United States, 196 U.S. 283 (1805). In Campbell v. United States, 115 U.S. App. D. C. 30, 316 F.2d 681 (1963) this court reversed a conviction on the grounds that the evidence did not meet the legal standard. The court there refers to the Allen charge as the "dynamite charge" and cites the Fifth Circuit Case of Green v. United States, 309 F.2d 852 (1962), which case states "'t]here is small, if any justification for its use" 309 F.2d at 854.

Appellants contend that the use of the charge was not justified in this instance, because it must have had the effect of causing jurors to depart from a conscientiously held viewpoint. See Jenkins v. United States, 380 U.S. 446 (1965). Appellants assert that where the evidence linking them to the

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17/From Allen v. United States, 164 U.S. 492 (1896).

the crime is so tenuous as to be almost speculative, to deliver the charge must necessarily result in some juror's unnecessarily departing from conscienciously held views of the defendant's innocence.

CONCLUSION

For the foregoing reasons, Appellants urge reversals of their convictions.

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